IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON COUNTS 1 AND 2 OF THE SECOND AMENDED COMPLAINT" [DKT #1872]

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Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint" [DKT #1872] ("Motion" or "MSJ") be denied in its entirety.

I. Disputed Material Facts[1]

Except where noted, the State disputes the following numbered assertions made by Defendants in their Statement of Undisputed Material Facts as follows:

1. Disputed. There are seven counties in the IRW. *See* SAC, ¶ 21 & SAC, Ex. 1.

2. Disputed. The primary land use in the IRW is pasture; developed land is a very small amount of the total land in the IRW. *See* Ex. 2 (M. Smith Report, at Table 1); Ex. 3 (Chaubey Depo., 65:10-12).

3. Disputed. The State's allegation pertains to poultry waste, not poultry litter.[2] *See* SAC, ¶ 57.

4. Disputed. This statement is nonsensical and the State's evidence of its injuries and response actions is not "limited to phosphorus and bacteria." The State has presented substantial evidence demonstrating that Defendants' waste disposal practices have caused injury to natural resources, the State incurred costs in responding to releases of hazardous substances from these practices, and that it is entitled to a declaratory ruling as to Defendants' liability for future response costs. *See e.g.*, ## 17, 19-21. For example, the State has presented evidence that poultry waste includes phosphorus, nitrogen, arsenic, zinc, and copper (and compounds thereof) and that those substances have been released into the soils and waters of the IRW. *See, e.g.*, Ex.

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[1] Defendants' Motion addresses the State's CERCLA claims, but their statement of ""Facts" goes well beyond these claims and is improper. The State responded to Defendants' statement of "Facts" in the context of its CERCLA claims only and reserves all rights to contest any of Defendants' statements that are raised in the context of any non-CERCLA claims.

[2] Defendants do not define "poultry litter" in their Motion. The State interprets the term "poultry litter" to mean "poultry waste" as defined in 2 Okla. Stat. § 10-9.1(B)(21).

4 (Olsen Decl., ¶ 5); Ex. 5 (Olsen Depo., 119:19 – 120:20; 130:25 – 131:12; 344:14 – 345:10). Phosphorus, arsenic, copper, and zinc are hazardous substances and the State has incurred costs in investigating and monitoring these substances. Ex. 4 (Olsen Decl., ¶ 6); Ex. 6 (Duncan Decl.); Ex. 7 (Smithee Decl.). Todd King's report on remediation options addresses injuries caused by phosphorus, nitrogen and bacteria and is not inclusive of all the State's evidence of injuries and response costs. Ex. 8 (King Depo., 69:14-19; 214:8-18). Dr. Fisher's testimony does not support the proposition for which it is cited.

5. Disputed. The State's claims for NRD under its non-CERCLA causes of action are not limited to injuries caused by phosphorus. *See, e.g.,* SAC, Counts 4, 5, 6 & 7.

6. Disputed. EPA's hazardous substance list contained in 40 C.F.R. § 302.4 lists phosphorus, which includes any and all forms of phosphorus, including phosphorus compounds. *See infra,* Section II.B.

7. Disputed. Defendants' Exhibits 6 and 7 do not speak to all the propositions stated. Defendants' Exhibit 8 fails to include the State's objection qualifying its response to the effect that poultry waste does not contain elemental phosphorus in its pure and unmixed form. *See* Ex. 9 (RTA, Objections).

8. Admitted.

9. Disputed. Defendants' Exhibit 10, on which "Fact #9" is based, speaks in terms of "phosphorus," does not identify any specific phosphorus compounds, does not discuss how common such specific compounds may or may not be in nature, and does not state that such specific compounds are essential nutrients. *See also* Ex. 4 (Olsen Decl., ¶ 7).

10. Admitted; although poultry waste also contains substances not necessary for plant growth including arsenic, hormones and pathogens and the nutrients are not balanced such that

poultry waste is a good fertilizer. *See* ## 3 *supra* and 13 *infra*. Disposal of poultry waste in excess of fertilizer requirements is not application of "fertilizer" and causes environmental injury.

11. Irrelevant. Ancient use of manure was unlike the disposal of waste from the industrialized farming conducted by Defendants. Ex. 10 (Lawrence PI Test., 1254:14-1255:7).

12. Disputed. Defendants misstate the State's response to Request to Admit No. 233, in which the State: (a) responded poultry waste has been used as a fertilizer or soil amendment only "in limited instances"; and (b) denied poultry waste has been land applied as a fertilizer or soil amendment predominantly in the past 50 years or more. *See* Defs.' Ex. 8 (RTA #233). Poultry waste is not registered as a fertilizer, *see* Ex. 10 (Johnson PI Test., 541:2-4), and is excluded from the legal definition of a fertilizer. *See* 2 Okla. Stat. § 8-77.3(11).

Further, applying poultry waste in excess of fertilizer requirements is not application of fertilizer. At a Soil Test Phosphorus ("STP") level of 65 lbs/acre or higher, there is virtually no agronomic benefit gained from applying additional fertilizer; Oklahoma State University ("OSU") Extension Service does not recommend additional phosphorus at that level. *See* Ex. 11 (Zhang Depo., 189:17-25); Dfts.' Ex. 9 at 3. Defendants' own expert admits that a field with an STP level of 65 or 100 lbs/acre does not need additional phosphorus. *See* Ex. 10 (Coale PI Test., 1798:20-24). Further, adding animal waste to fields testing above 120 lbs/acre is *disposal* of the waste without benefit to crop production but with increased *risk to water quality by runoff and erosion*. *See* Ex. 11 (Zhang Depo., 201:1-19 & Depo. Ex. 1 at p. 4). Northwest Arkansas and Eastern Oklahoma fields are saturated with phosphorus such that it is no longer needed for the vast majority (93%) of fields tested. *See, e.g.,* Ex. 12 (Johnson Rpt. at 13-16).

13. Disputed. Poultry waste is not a good fertilizer. *See, e.g.,* Ex. 10 (Johnson PI Test., 489:1-491:18, 476:1-19 & 480:7-13). *See also* # 12, *supra.*

14. Disputed. The exhibits relied upon by Defendants do not show that the State recognizes poultry waste as an effective fertilizer or actively encourages or approves of its use. Defendants' Exhibits 9 and 13 are fact sheets published by OSU relating to managing poultry waste in an environmentally sound manner and do not represent the State's position on the "effectiveness" of the waste as a fertilizer or any approval or encouragement. In any event, these very publications caution that "improper use of animal waste can result in environmental damage" and set forth the agronomic requirements for crops, instructing that poultry waste should not be disposed of in excess of crop nutrient requirements. *See* Defs.' Exs. 9 and 13.

Poultry waste is not an effective fertilizer. *See* # 13, *supra*. Oklahoma had to create a mechanism to move poultry waste from areas where concentrated poultry waste production created environmental concerns. *See* Defs.' Ex. 27; Ex. 10 (Tolbert PI Test., 91:4-24). The State regulates poultry waste through a registration law, *see* 2 Okla. Stat. § 10-9 *et seq.*, providing that "[t]here shall be no discharge of poultry waste to waters of the state," and "[p]oultry waste handling, treatment, management and removal shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(1), (4)(a) & (4)(b); *see also, e.g.,* 27A Okla. Stat. § 2-6-105(A). Defendants have not complied with these laws. *See* ## 16; 20-21, *infra.*

15. Disputed. *See* ## 12-14, *supra.*

16. Disputed. Poultry waste is not a fertilizer under the Oklahoma Fertilizer Act. *See* 2 Okla. Stat. § 8-77.3(11). Thus, the use of poultry waste as a "fertilizer" is not authorized or regulated by Oklahoma law. Instead, applicable Oklahoma statutes and rules: (a) require poultry

operations to register with the State; and (b) establish standards for the management of poultry waste in order to protect human health and the environment. *See* # 14, *supra*; OAC 35:17-5-5(a)(7)(C) (runoff of poultry waste from the application site is prohibited); 2 Okla. Stat.§ 10-9.3.

Arkansas law recognizes that improper utilization of poultry waste may result in the buildup of nutrients in the soil and cause those nutrients to leave the soil and enter waters within the state. *See* Ark. Code Ann. § 15-20-902(3). When enacting the Arkansas Soil Nutrient Application and Poultry Litter Utilization Act, the Arkansas General Assembly found that (a) land application of poultry litter may have caused "excessive soil nutrient concentration" in areas of Arkansas; (b) "[l]and application of poultry litter is a *significant source* of nutrients" in these areas; and (c) it is therefore "necessary to limit the application of nutrients and to regulate the utilization of poultry litter" in order to protect these areas from "negative[] impact." Ark. Code Ann. 15 § 15-20-1102 (emphasis added). Arkansas recognizes the Illinois River Watershed as a "nutrient surplus area" for both phosphorus and nitrogen, *see* Ark. Code Ann. § 15-20-1104(a)(1), in which continued application of the nutrients to the soil could negatively impact soil fertility and the waters of the state. *See* Ark. Code Ann. § 15-20-1103(12).

17. Disputed. The evidence establishes that poultry waste is not being land applied in conformance with Oklahoma and Arkansas law. Defendants do not attempt to demonstrate the proper disposal of the 345,000 tons of waste produced annually, but merely offer anecdotes regarding the knowledge of various persons on limited topics. Significantly, Defendants' counsel has admitted to over-application of poultry waste. *See* Ex. 10 (Ryan Opening, PI Tr. 46:7-18). Substantial record evidence demonstrates poultry waste is not being managed in accordance with Oklahoma law. *See* ## 12-14, *supra* & 19-21, *infra*. As demonstrated in Disputed Material Fact #16, *supra,* Oklahoma law prohibits runoff and discharge of poultry

waste to the water, creating an environmental or public health hazard, or resulting in contamination of water. Yet, despite this clear mandate, the evidence establishes that poultry waste: (a) has in fact been discharged to the waters of the State; (b) has been handled in such a way that it creates an environmental and health hazard; (c) has been handled in such a way that it has resulted in contamination of the waters of the State. *See, e.g.,* Ex. 13 (State's PI Ex. 395 at 18); Ex. 14 (Stevenson Depo., 113:2-20); Ex. 15 (Cooke Depo., 327:10 – 328:1); Ex. 16 (Teaf Depo., 36:12-18; 476:3-8). Further, neither the testimony of Shannon Phillips nor John Littlefield, relied upon by Defendants, supports the proposition that waste application is in conformance with Oklahoma law. For instance, while Shannon Phillips testified that she does not know of anyone violating animal waste management plans, she further explained that it "not [her] responsibility to monitor" such plans. Dfts.' Ex. 15. And one man's testimony (Mr. Littlefield) that he doesn't know any "bad actors" (Dfts.' Ex. 14) is hardly proof of uniform obedience to the law.

Moreover, the evidence cited by Defendants does not prove waste is applied in compliance with Arkansas law. For instance, Mr. Young's testimony cited by Defendants shows that Arkansas only inspects 5% of permitted facilities annually, but still assessed at least ten penalties. *See* Ex. 10 (Young PI Test., 1301:6-1302:18) & Defs.' Ex. 12. Mr. Young's testimony further shows that Arkansas requiring a notarized complaint has a "chilling effect" on citizen reports, but that there were two complaints of over-applied poultry waste resulting in three warning letters. *See* Ex. 10 (Young PI Test., 1302:22-1303:25) & Defs.' Ex. 8.

18. Disputed. "Common agricultural practice" is not the legal standard for the exception under CERCLA. Defendants have the burden of establishing their waste is applied as the "normal application of fertilizer." They have not met that burden. In fact, the evidence

establishes that what Defendants regard as "common" or "normal" amounts to widespread disposal of poultry waste that has resulted in pervasive pollution of the soils and waters of the IRW. *See, e.g.*, #17, *supra*; ##19-21, *infra*. *See also* Ex. 10 (Ryan Opening, PI Tr., 46:7-18).

19. Disputed. Dr. Engel did not testify that the "vast majority" of the acreage in the IRW has never had poultry waste deposited, stored, disposed of, placed, or located on it as Defendants assert. Indeed, Dr. Engel merely agreed that "poultry litter is not land applied on *every* parcel but is applied on particular parcels of land . . . ." *See* Ex. 17 (Engel Depo., 69:19-24) (emphasis added). In any event, the evidence shows poultry waste is deposited and disposed of in massive quantities throughout the IRW. Land use in the IRW is approximately 58% pasture. Ex. 3 (Chaubey Depo., 137:1-11). Poultry waste is land applied to pasture land in the IRW. *Id.* at 184:15-25. Indeed, land application is the "primary method" of poultry waste disposal in the IRW. Ex. 3 (Chaubey Depo., 32:8-14).

20 & 21. Disputed. It is irrelevant whether the State can identify "*each* location": within the IRW to which poultry litter has been applied or its constituents have come to be located; or from which alleged releases or threatened releases of hazardous substances have occurred or where such hazardous substances have come to be located. Nonetheless, there is substantial evidence that poultry waste and hazardous substances from its constituents have come to be located throughout the IRW.

Monty Henderson, the President of Defendant George's, has written that: (a) "[t]he problem comes when more litter is used than the crops need and phosphorus levels become too high in the soil"; and (b) "[d]uring major rain events, some of the phosphorus becomes soluble and washes off into the streams and lakes." *See* Ex. 18 (*From the Desk of Monty Henderson*); Ex. 19 (Henderson Depo., 88:10-89:9). *See also* Ex. 20 (Mullikin Depo., 57:19-58:1). The

USDA has recently reported that: land applying poultry waste has led to an "excessive buildup of phosphorus that currently pollutes" the waters of the IRW; "[t]he number one cause of water impairments within the [IRW] is excessive nutrient loading . . .;" and "[t]his is due in large part to the practice of" land applying "poultry litter." *See* Ex. 13 (State's PI Ex. 395 at 18, 40)

There are approximately 1850 active poultry houses located throughout the IRW. *See* Ex. 10 (Fisher PI Test., 412:5-14); Ex. 21 (State's PI Ex. 113); Ex. 22 (State's PI Ex. 397). Defendants' birds raised in these houses generate approximately 345,000 tons of poultry waste in the IRW annually. *See* Ex. 10 (Engel PI Test., 426:11-15). Nearly all of this poultry waste is land disposed near the houses where the waste is generated. *See* Ex. 10 (Engel PI Test., 446:11-18; Ex. 23 (Fisher Decl., ¶ 5); Ex. 24 (Daniel Depo., 26:23-27:23 & 50:17-51:16); Ex. 3 (Chaubey Depo., 35:2-14).

Because of excessive land application of poultry waste, high soil phosphorus levels are present throughout the IRW. *See* Ex. 12 (Johnson Rpt. at 13-16); *see also* Ex. 25 (State's Response to CTP 8/22/06 interrogatory #9); Ex. 10 (Tolbert PI Test., 91:4-24); Ex. 26 (State's PI Ex. 47). For instance, available data indicates that the *average* county-wide soil test phosphorus level in Benton and Washington counties is 402 lbs/acre. Ex. 12 (Johnson Rpt. at 14). And "contaminants deposited on the surface within the [IRW] are prone to runoff from soils in about half of the watershed and are prone to infiltration through soils in the remaining half of the watershed." *See* Ex. 23 (Fisher Decl, ¶ 6); *see also* Ex. 3 (Chaubey Depo., 137:12-138:6; 141:3-19). In fact, "land application of poultry waste to the karst terrain of the [IRW] means that constituents of this waste . . . travel readily through the soils and underlying geologic media to discharge at and into ground water springs and surface streams *throughout* the [IRW]." *Id.*

Poultry waste is the "*dominant source*" of phosphorus loading in the IRW. Ex. 3 (Chaubey Depo., 74:14-75:6) (emphasis added). "Poultry production within the [IRW] is currently responsible for more than 76% of P movement into the watershed." Ex. 27 (Engel Decl., ¶ 6); Ex. 2 (M. Smith Rpt.) (same). *See also* Ex. 28 (Illinois River Phosphorus Sampling Results and Mass Balance Computation, 6). Importantly, the IRW is a "single hydrologic unit"; all of the streams of the IRW are "connected." *See* Ex. 3 (Chaubey Depo., 151:2-13; 152:7-11). Thus, once phosphorus is introduced into the streams of the Illinois River Drainage Area, it will eventually be transported downstream and ultimately reach Lake Tenkiller. *Id.* at 66:2-15.

The evidence shows that "phosphorus is widespread and pervasive throughout the [waters of the] entire basin with the average concentrations at most locations above 0.037 mg/L and above background concentrations." Ex. 4 (Olsen Decl, p. 5). Dr. Jan Stevenson, who works with EPA's nutrient criteria group and has done many nutrient investigations across the United States, testified that nutrient concentrations (including phosphorus) in the waters of the IRW are "higher . . . for a *watershed as a whole* than any other watershed that [he's] had experience with." Ex. 14 (Stevenson Depo., 116:10-119:7) (emphasis added). Overall, it is undeniable that high levels of phosphorus have come to be located throughout the waters of the IRW. *See, e.g.,* Ex. 29 (USGS, "Phosphorus Concentrations, Loads, and Yield in the Illinois River Basin," 1; 22 (Table 8)); Ex. 28 (Illinois River Phosphorus Sampling Results and Mass Balance Computation at 11); Ex. 30 (Water Quality Assessment Integrated Report (2004), Appx. C); Ex. 31 (Oklahoma's Nonpoint Source Assessment Report (2006 Updates) at 14 (Table 4)).

22. Disputed. Contrary to Defendants' assertion otherwise, the State has identified areas or parcels of land within the IRW allegedly impacted by the deposition, storage, disposal, placement or migration of the hazardous substances. *See, e.g.,* ## 19-21, *supra.* Nonetheless,

because phosphorus contamination is so pervasive throughout the watershed, *Id.*, it would be impracticable to separate areas or parcels of land impacted by phosphorus from areas or parcels of land not impacted as Defendants suggest.

II. Argument

A. CERCLA must be construed liberally

"Congress enacted CERCLA to facilitate the expeditious cleanup of environmental contamination caused by hazardous waste releases." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992). CERCLA "must be interpreted liberally so as to accomplish its remedial goals." *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172 (10th Cir. 2004).[3]

B. The form of phosphorus contained in Defendants' poultry waste is a "hazardous substance" under CERCLA

40 C.F.R. § 302.4 provides that "[t]he elements and compounds and hazardous wastes appearing in Table 302.4 are designated as hazardous substances under section 102(a) of [CERCLA]," and lists "phosphorus" as a CERLCA hazardous substance. Defendants wrongly assert that this "phosphorus" entry on the list of CERCLA hazardous substances is limited to only "elemental phosphorus." The "phosphorus" entry found in 40 C.F.R. § 302.4 plainly includes those forms of phosphorus contained in Defendants' poultry waste.

The list of CERCLA hazardous substances found in 40 C.F.R. § 302.4 is derived by reference to CERCLA's provisions and to that of other environmental statutes. *See* 42 U.S.C. § 9601(14). A substance need only be designated as hazardous under any one of the provisions or statutes set forth in 42 U.S.C. § 9601(14) to be a CERCLA hazardous substance. *See B.F.*

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[3] Defendants do not dispute that arsenic, copper and zinc (and compounds thereof) are hazardous substances and have focused their Motion on phosphorus. The State has presented undisputed evidence that it incurred response costs in responding to the release of these substances from Defendants' poultry waste disposal. *See, e.g.* #4, *supra.* Accordingly, summary judgment for Defendants as to these releases has not been sought and should not be granted.

Goodrich Co. v. Murtha, 958 F.2d 1192, 1200 (2d Cir. 1992). "Phosphorus" is listed under CERCLA by virtue of its listing under the Clean Water Act ("CWA") and the Clean Air Act. *See* 40 C.F.R. 302.4. Under 33 U.S.C. § 1321(b)(2)(A) of the CWA, the listing of a substance as hazardous is not necessarily because the substance is inherently toxic but rather because it "present[s] an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches." Further, unlike some of the sources from which it is derived, the CERCLA hazardous substance definition itself *does not* depend on either the concentration or quantity of the substance present. *See Murtha*, 958 F.2d at 1200.

Significantly, the presence *in any from* of a listed hazardous substance is enough to bring a mixture or waste solution within the definition of a CERCLA hazardous substance:

> "[W]hen a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability. Liability under CERCLA depends only on *the presence in any form* of listed hazardous substances." It is enough that a mixture or waste solution contain a hazardous substance for that mixture to be deemed hazardous under CERCLA. The waste product itself "need not be listed by name -- instead of its constituent components -- to fall within the Act."

B. F. Goodrich v. Betkoski, 99 F.3d 505, 515-16 (2d Cir. 1996) (citations omitted) (emphasis added). Poultry waste contains phosphorus compounds, *See* Dfts.' MSJ at 2; # 8, *supra.*, and phosphorus compounds contain phosphorus.[4] *See* ## 7-8, *supra.* It cannot be disputed that phosphorus compounds are a form of phosphorus or that phosphorus is a constituent component of phosphorus compounds, including orthophosphates (PO_4). *Id.* Thus, the form of phosphorus found in poultry waste is a CERCLA hazardous substance. *See Betkoski*, 99 F.3d at 515-16.

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[4] In fact, it is the practice of the industry, agricultural community and government to refer to these phosphorus compounds as "phosphorus." *See, e.g.,* Ex. 32, at PIGEON.0630, PIGEON.0643-44 (Poultry Water Quality Handbook written for industry); Defs.' Ex. 9, at 1.

Chief Judge Eagan reached precisely this conclusion in her thoroughly reasoned decision in *City of Tulsa*, 258 F.Supp.2d at 1283-85:[5]

> [T]he Court concludes the EPA intended to include phosphorus compounds, such as phosphates, in listing phosphorus in Table 302.4. Whether expressed as PO_4 or another chemical combination of phosphorus and oxygen, phosphates contain phosphorus. Since elemental phosphorus is highly combustible, poisonous and so reactive that it does not occur free in nature (an undisputed fact in this case), the EPA likely contemplated liability for phosphorus in real, not theoretical, releases. ...[T]he Court finds that the phosphorus contained in poultry litter in the form of phosphate is a hazardous substance under CERCLA.

(Citations omitted.) Judge Eagan's opinion is the only one on the merits addressing the precise issue presently before the Court that the State is aware of. Defendants have cited *no* case holding that the form of phosphorus found in poultry waste is not a CERCLA hazardous substance.

Rather, Defendants cobble together a variety of flawed arguments to assert that the form of phosphorus in poultry waste is not a hazardous substance. First, Defendants argue that EPA and Congress intended to designate as a hazardous substance something that, by their own admission, is "highly reactive" and "does not naturally occur in the environment." This would thus render 40 C.F.R. § 302.4 nonsensical. CERCLA is designed to address real "releases," not wholly theoretical "releases." The only plausible interpretation of "phosphorus" is one which includes the forms of phosphorus actually encountered in and causing harm to the environment.[6]

Second, Defendants assign significance to the fact that on the 40 C.F.R. § 302.4 list, the Chemical Abstract System ("CAS") number is the number assigned to elemental phosphorus.

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[5] As it was vacated at the unopposed request of the defendants solely as part of the settlement, *see* DKT #472 & DKT #473 at ¶ 8, and not as a result of a motion for reconsideration or any stated need to correct or negate the substance of the opinion, the reasoning found in this opinion should be viewed as persuasive authority. *See Oklahoma Radio Associates v. Magnolia Broadcasting Co., Inc.*, 3 F.3d 1436, 1444 (10th Cir. 1993) (discussing vacating opinions).

[6] Phosphorus in the form of phosphates has long been an environmental concern. *See, e.g., Soap & Detergent Association v. Clark*, 330 F. Supp. 1218, 1220 (S.D. Fla. 1971) (discussing eutrophication).

However, CAS numbers are not significant for purposes of liability under CERCLA. *See United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993). Underscoring this point, CAS numbers are not significant for the CWA list from which the CERCLA hazardous list drew phosphorus. *See* 40 C.F.R. § 116.4 (numbers added for convenience of the user only.)

Third, Defendants invoke the *expressio unius est exclusio alterius* canon of statutory construction. But such canons of statutory construction are not inflexible and "must instead be construed within the context of the statute as a whole, so as to best effectuate the legislative intent underlying the entire statutory scheme." *Reynolds Metal Co. v. Arkansas Power & Light Co.*, 920 F.Supp. 991, 998-99 (E.D. Ark. 1996) (Citations omitted) (declining to apply "*expressio unius*" canon); *see also K & Lee Corp. v. Scottsdale Ins. Co.*, 769 F.Supp. 870, 875 (E.D. Pa. 1991). There is no evidence that Congress or the EPA made a conscious decision to exclude the form of phosphorus found in poultry waste as a CERCLA hazardous substance[7 & 8] and application of the "*expressio unius*" canon would run counter to the fact that CERCLA is a remedial statute that courts construe liberally to effectuate its broad response and reimbursement goals. *See Murtha*, 958 F.2d at 1198.

Fourth, Defendants argue that phosphorus compounds are common in nature and therefore cannot be hazardous.[9] In dismissing a similar argument in *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260 (3rd Cir. 1992), however, the court stated: "that Congress

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[7] In fact, in 2006 and 2007 there were failed efforts in Congress to amend CERCLA to provide that manure and its constituents are not a "hazardous substance[s]." *See* H.R. 4341 & S. 3681 (109th Cong.); H.R. 1398 & S. 807 (110th Cong.).

[8] Defendants'reliance on the "and compounds" language found on certain entries on the 40 C.F.R. 302.4 list ignores the fact that this list is a compilation from various other lists.

[9] The title of the USDA listing of food products that Defendants have attached to their Motion, *see* Ex. 10 ("*Phosphorus, P* (mg) Content of Selected Foods per Common Measure, sorted alphabetically") (emphasis added) underscores the State's contention that phosphorus compounds are viewed by the federal government as a form of phosphorus and that use of the term phosphorus is intended to include phosphorus compounds.

has enacted laws to limit, and perhaps limit quite severely, additions to nature for the sake of the environment and of life on this planet seems eminently reasonable." (Citation and quotations omitted.) *See also Alcan Aluminum Corp.*, 990 F.2d at 716.

Finally, Defendants rely upon a July 18, 2006 EPA guidance memo stating that "... phosphorous...compounds other than those listed are not hazardous substances." *See* Defs.' Ex. 23. This memo is not entitled to any weight. Guidance memos do not warrant *Chevron*-style deference. *See McGraw v. Barnhart*, 450 F.3d 493, 500-01 (10th Cir. 2006). "Instead, such informal interpretations 'are entitled to respect under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 . . . (1944), *but only to the extent that those interpretations have the power to persuade.*'" *Id.* at 501 (citation omitted) (emphasis added). "With *Skidmore* deference, the weight to be given the agency's practice in particular circumstances depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Id.*

First, EPA showed absolutely no thoroughness in the consideration of the matter addressed in the guidance memo. Rather the guidance memo was the product of an entirely one-sided process that involved only the poultry industry and had no input from the State. To wit:

- The guidance memo was issued at the request of the poultry industry. *See* Ex. 33 (4/25/06 (7:41pm) Email and Attachment to C. Brown) ("The industry requests EPA to clarify these issues and proposes to contact EPA regarding next steps in a few weeks").
- The rationale for the poultry industry's request was the State's lawsuit. *Id.*
- EPA met with representatives of poultry industry, *see* Ex. 34 (4/25/06 (3:40pm) Email and Attachment to C. Brown) (listing attendees from poultry industry), and was provided written materials by the poultry industry, *Id.*, but the State was neither informed that EPA was considering the issue, nor was input from the State requested or considered.

See Wyeth v. Levine, --- U.S. ---, 2009 WL 529172, *11 (U.S.Vt.) (affording FDA's views of state law no weight and concluding that such views were "inherently suspect" where states and other interested parties were not given notice or opportunity to comment). *Compare McGraw*,

450 F.3d at 501 (finding agency position persuasive where position "appears thoroughly considered"). The guidance memo was the product of political lobbying, not scientific inquiry. *Second*, the guidance memo contains no substantive reasoning and is entirely conclusory in nature. *Compare McGraw*, 450 F.3d at 501 (finding agency position persuasive where position "expresses valid reasoning"). *Third*, the guidance memo is not entitled to weight as being consistent with earlier and/or later EPA pronouncements because EPA had not made any other interpretative pronouncements concerning 40 C.F.R. § 302.4 and phosphorus compounds. *Compare McGraw*, 450 F.3d at 501 (finding agency position persuasive where position "reflects the agency's consistent practice over a number of years"). *And fourth*, the guidance memo is not entitled to weight because it is inconsistent with the only judicial decision to directly address the issue. In *City of Tulsa*, the Court found after briefing by both sides "that phosphorus contained in poultry litter in the form of phosphate is a hazardous substance under CERCLA." *Compare McGraw*, 450 F.3d at 501 (finding agency position persuasive where position "is consistent with (indeed, apparently stems from) the weight of circuit court authority on this issue"). Finally, as explained in the OMB's Final Bulletin for Agency Good Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), "OMB has been particularly concerned that agency guidance practices should be more transparent, consistent and accountable. Such concerns have also been raised by other authorities, including Congress and the courts." The guidance memo here suffers from the same defects that raised OMB's concerns and prompted its Final Bulletin.

In sum, the form of phosphorus found in poultry waste is a CERCLA hazardous substance. Summary judgment in favor of Defendants must be denied.

C. Defendants have not established that the CERCLA fertilizer exemption applies

Defendants do not dispute that they have released, and even over-applied, poultry waste onto lands of the IRW; or that such disposal practices have released phosphorus compounds into the waters of the IRW.[10] *See, e.g.* MSJ; Ex. 10 (Ryan Opening, PI Tr. 46:7-18); Ex. 17 (*From the Desk of Monty Henderson*). Thus, Defendants do not dispute that their waste disposal practices constitute a "release" to lands and waters under CERCLA. Instead, Defendants simply advance a legal argument that their disposal practices are exempt under a strained and unreasonable interpretation of the "normal application of fertilizer" exception. MSJ at 12-13. Defendants' sole basis for arguing that their waste disposal practices constitute the "normal application of fertilizer" is that there is no dispute of fact that "poultry *litter* is applied in the IRW in a normal manner." MSJ at 18. Although it is their burden to demonstrate the exception applies, Defendants submitted no evidence that their waste has been applied in a normal manner as fertilizer in the IRW or that hazardous substances in the waste have not been released off-site to lands and waters of the IRW.

The evidence establishes that what Defendants regard as "normal" is the disposal of poultry waste far in excess of fertilizer requirements and releases of phosphorus causing pervasive pollution of the soils, surface water and groundwater of the IRW in violation of state law. *See, e.g.,* ## 12-14; 19-21, *supra*. The State does not dispute that these are Defendants' "normal" practices, but strongly disputes Defendants' characterization of these practices and releases as "application" of "fertilizer" in a "normal" manner.

1. "Release" under CERCLA is broadly defined, while exceptions to the "release" definition are narrowly defined.

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[10] Defendants' do not dispute the State's evidence that their disposal practices have also released other hazardous substances, including arsenic, copper and zinc to lands and waters of the IRW. *See, e.g.,* # 4, *supra*. Arsenic is not a plant nutrient and these releases are not the "normal application of fertilizer" under CERCLA. *See* ## 10, *supra*.

Defendants assert that the disposal of their poultry waste in the IRW falls within the "fertilizer exception" to the definition of "release" under CERCLA. Specifically, 42 U.S.C. § 9601(22) provides that:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment ..., but excludes ... (D) the normal application of fertilizer.

(Emphasis added.)

"The courts have construed CERCLA's definition of 'release' broadly." *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146, 1152 (1st Cir. 1989); *see also Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989) ("We believe that the definition of 'release' should be construed broadly"). In contrast, "exceptions to CERCLA liability should ... be narrowly construed." *See Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989).

Although CERCLA does not define the term "the normal application of fertilizer," CERCLA's legislative history reveals that it was Congress's intent that this exception be limited to *agronomic* use of fertilizers.[11] Senate Report pertaining to this exception explains:

> The term "normal field application" means the act of putting fertilizer on crops or cropland, and *does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops.*

S. Rep. No. 96-848, at 46 (1980). "Because the House concurred in the Senate bill without amendment, *see* 126 Cong. Rec. 31,950-82 (1980), the Senate report is powerful evidence of congressional intent." *Colorado v. Dept. of Interior*, 880 F.2d 481, 487 (D.C. Cir. 1989).

The general rule is that the party seeking the benefits of a statutory exception bears the burden of proof on the applicability of the exception. *United States v. First City Nat'l Bank*, 386

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[11] *United States v. Tropical Fruit, S.E.*, 96 F. Supp. 2d 71, 88 (D.P.R. 2000) (construing FIFRA provision regarding "application of a pesticide" as meaning "the placement for effect of a pesticide at or on the site where the pest control or other response is desired").

U.S. 361, 366 (1967). Defendants do not attempt to demonstrate, or even argue, that their poultry waste is actually being applied in the IRW as fertilizer in amounts or concentrations necessary or beneficial to crops. This is because they cannot do so. It is well-established that poultry waste is applied to lands in the IRW far in excess of the amounts needed by and beneficial to crops. *See, e.g.*, ## 12; 19-21, *supra.* Neither do Defendants argue or present evidence that their disposal practices have not resulted in the release of their waste and its constituents from the fields into the waters of the IRW. This is because it is a widely accepted fact that Defendants' waste disposal practices have resulted in the release of phosphorus from the fields and the pervasive pollution of the waters of the IRW. *Id.* at ## 17, 20-21. Accordingly, Defendants have failed to meet their burden of demonstrating that their waste is "fertilizer" and that the "normal application of fertilizer" exception applies to their waste disposal practices.

2. Defendants' waste disposal practices are not the "normal application of fertilizer."

Even under Defendants' common definitions of "normal" and "fertilizer," Defendants' disposal of poultry waste on land in excess of the fertilizer requirements of crops in the IRW is not the "normal application of fertilizer." The dictionaries relied upon by Defendants define "fertilizer" as something "spread on or worked into the soil to *increase capacity* to support plant growth" (Defs.' Ex. 24) or "a substance . . . used to make soil *more* fertile." Defs.' Ex. 25 (emphasis added). The evidence submitted by Defendants does not demonstrate that poultry waste is recognized by the State as an effective fertilizer or that the State actively encourages or approves its use in the IRW.[12] *See* ## 14, 16 & 17, *supra.* Poultry waste is not an effective fertilizer and the documents cited by Defendants as representing the State's position demonstrate

[12] Poultry waste is not a fertilizer under Oklahoma law which specifically excludes "unmanipulated animal manures" from the definition of fertilizer. 2 Okla. Stat. § 8-77.3(11) (emphasis added).

that poultry waste should not be applied to soil beyond the limits of the growing crop's nutrient needs and that pollution will result from disposal of poultry waste in excess of crop fertilizer requirements. *See* ## 13-14, *supra.*

Application of poultry waste to land at rates greater than crop fertilizer requirements is not application of fertilizer. See # 12, *supra.* Dr. Zhang, whom Defendants regard as "Oklahoma's leading authority on poultry litter" (MSJ at 14), has determined that applying poultry waste to land in excess of 120 lbs/acre STP is the disposal of water without benefit to crop production that results in increased releases of phosphorus to waste.[13] *Id.* And 65 lbs/acre is a well-established agronomic fertilizer rate, not based on what is "normal," but based on what is (or isn't) "fertilizer."*Id.*

It is undisputed that Defendants' poultry waste has been applied to lands far in excess of fertilizer requirements in the IRW. Repeated land application of poultry waste in excess of fertilizer requirements in the IRW has resulted in excessive soil phosphorus levels that would not occur in nature. *See* # 12, 20-21 *supra.* Application of poultry waste on fields with phosphorus levels over 65 does not "increase the capacity to support plant growth," or make the "soil more fertile" and is, thus, not fertilization but waste disposal. *Id.*

Likewise, Defendants' attempt to call their practices "normal" must fail. The word "normal" cannot be based on the subjective intention of the polluters, but must be tied objectively to the word "fertilizer." For example, the Supreme Court has held that the "normal" qualifications of an occupation must be understood objectively by linking "occupational" and

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[13] Thus, Defendants' assertion that Dr. Johnson's opinions are merely his own "personal views" is demonstrably false. MSJ at 17. Indeed, *Defendants'* Exhibit 9, which was co-authored by Drs. Zhang *and* Johnson, provides that "[r]esearch has shown that when STP reaches 65, it is 100 sufficient for *all* crops." Dfts.' Ex. 9 at 3 (emphasis added). And both Drs. Zhang and Johnson have determined that once STP levels "become excessive, further applications of P will increase the potential for P movement and do not provide any agronomic benefits." *Id.*

"qualification," making these objective, verifiable requirements concerning job-related skills and aptitudes, and not simply qualifications as an employer defines them. *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). Only by linking "normal application" to "fertilizer," and giving the latter word objective and scientifically based content, can Congressional intent be realized. When that is done, Defendants' argument disappears: the normal practice of over-applying waste far in excess of fertilizer requirements is not the application of "fertilizer" at all; it is disposal of waste and is a "release" under CERCLA. This conclusion is confirmed by both the common meaning of the phrase "normal application of fertilizer" and the authoritative Senate Report which makes clear that the normal application does not include putting "significantly greater concentrations or amounts than are beneficial to crops." S. Rep. No. 96-848, at 46 (1980). Whether Defendants, their growers or waste applicators complied with state law in disposing of Defendants' waste is irrelevant to whether the "normal application of fertilizer" exception applies to these practices.[14]

3. Release of poultry waste and its constituents from a land disposal site is not the "normal application of fertilizer.

Moreover, the widespread and repeated releases of a hazardous substance from the fields to other lands waters of the IRW from poultry waste application and elevated soil phosphorus

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[14] Even so, the evidence cited by Defendants does not support their assertion that their waste disposal practices comply with state law. *See* MSJ at 16 and # 17, *supra.* The testimony of a few individuals on limited topics does not establish an undisputed fact that "growers, farmers, ranchers and applicators in the IRW apply poultry litter in conformance with [applicable] laws and regulations." MSJ at 16. The State has submitted evidence establishing that , in violation of Oklahoma law, poultry waste has: (a) been discharged to the waters of the State; (b) handled in such a way that it creates an environmental and health hazard; and (c) handled in such a way that it has resulted in contamination of the waters of the State. *See, e.g.,* ## 17, 20-21, *supra.* Rather than encourage application of poultry waste in the IRW, both Arkansas and Oklahoma have had to expend state and federal funds to remove poultry waste from the watershed due to the excessive amounts of waste generated by Defendants and their long history of applying the waste to land in excess of any fertilizer requirements. *See* ## 14, 16 & 17, *supra.*

levels from repeated waste disposal each constitute a separate release under CERCLA. *See* # 17, *supra*; *Tropical Fruit,* 96 F. Supp. 2d 71, 86 (D.P.R. 2000) (numerous instances of movement of pesticides beyond the boundary of the Farm clearly falls within the scope of a "release"). Such releases are not the "normal application of fertilizer" under CERCLA. *See also* S. Rep. No. 96-848, at 46 (1980) ("normal field application" does not include the dumping, spilling or emitting of fertilizer in "any other place.") Moreover, CERCLA liability also springs from the "threatened release" of a hazardous substance. *Id.*

This Court has denied summary judgment on a virtually identical argument that land application of poultry waste is the "normal application of fertilizer. *City of Tulsa v. Tyson,* 258 F.Supp.2d 1263, 1288 (N.D. Okla. 2003) *vacated in connection with settlement*, and Defendants present no reason why this Court should not do so again. The evidence here establishes that Defendants' disposal of poultry waste results in widespread and repeated releases, and threatened releases, of hazardous substance to the soils and waters of the IRW. *See, e.g.,* ## 3, 4, 10, 19-21, *supra*. Such releases are not the "normal application of fertilizer" under CERCLA.

D. The State has identified proper CERCLA "facilities""

Phosphorus from Defendants' poultry waste has come to be located throughout the IRW[15]. *See* ## 19-21, *supra.* Indeed, poultry waste is the "*dominant source*" of this phosphorus. *See* Ex. 3 (Chaubey Depo., 74:14-75:6) (emphasis added). From the generation of phosphorus-laden poultry waste at any of the 1800+ active poultry houses within the IRW to the ultimate deposition of phosphorus in Lake Tenkiller, there is an interconnected phosphorus transport process which permeates the IRW. *Id.*

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[15] The State has also presented evidence that poultry waste includes arsenic, zinc, and copper (and compounds thereof) and that Defendants' poultry waste has been deposited throughout the IRW. *See, e.g.,* ## 4, 20-21, *supra.* Thus, these hazardous substances have also come to be located throughout the IRW, and the IRW is a proper CERCLA "facility."

The State has alleged that there are two separate CERCLA facilities. The first is the IRW, as it is a site or area where a hazardous substance has been "deposited, stored, disposed of, or placed, or otherwise come to be located." *See* SAC, ¶¶ 71 & 80. The second is the poultry growing buildings, structures, installations and equipment, as well as the land to which poultry waste has been applied. *See* SAC, ¶¶ 71 & 80. Defendants contend that both of these facilities are legally insufficient under 42 U.S.C. § 9601(9). Defendants are wrong.

Defendants argue that the definition of "facility" is not broad enough to encompass the IRW as a whole. However, "the term 'facility' enjoys a broad and detailed definition." *United States v. Bestfoods*, 524 U.S. 51, 56 (1998). A "facility" is defined as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).[16] Subpart (A) delineates examples of facilities, while subpart (B) "provides a catch-all provision." *See Sierra Club,* 387 F.3d at 1170. Thus, "the two-part disjunctive definition of 'facility' means whatever is appropriate for the facts at hand . . . ." *Id.* at 1171.

Contrary to Defendants' assertions, courts have given the term "facility" a very broad meaning. *First,* a "facility" is not limited by property lines. *See, e.g., Nutrasweet Co. v. X-L*

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16 In a specious argument in fn. 17 of their Motion, Defendants, without any citation to authority, assert that poultry waste "qualifies as a 'consumer product in consumer use' under [42 U.S.C. § 9601(9) and] is therefore not itself a CERCLA facility." As explained in *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 257 (5th Cir. 1998), however, "["[b]ased on the plain language of the exception, the applicable legislative history, and the broad remedial purpose of CERCLA, we conclude that 'consumer product in consumer use' means any good normally used for personal, family, or household purposes, which was being used in that manner when the subject release occurred." *See also, KN Energy v. Rockwell Int'l Corp.*, 840 F. Supp. 95, 100 (D. Colo. 1993). It is beyond dispute that poultry waste is not a good normally used for personal, family, or household purposes.

Eng'g Corp., 933 F.Supp. 1049, 1417-18 (N.D. Ill. 1996) ("facility" included both the site at which the hazardous substances were dumped and site to which substances migrated). *Second,* every part of a site or area need not be contaminated in order for it to be a "facility." *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998) ("[A]n area that cannot be reasonably or naturally divided into multiple parts or functional units should be defined as a single 'facility,' even if it contains parts that are non-contaminated. Were this not the case, the statute would have defined a facility as 'those *parts* of a site' with contamination") (emphasis in original) (citations omitted). *Third*, multiple facilities can be aggregated into a single "facility." *Sierra Club*, 387 F.3d at 1174 (defining entire farm complex a "facility" rather than each individual lagoon, barn and land application area contained within the complex). *And fourth,* a geographical region -- such as a watershed -- can clearly constitute a "facility."[17] *See, e.g., Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 fn 3 & 1074 (9th Cir. 2006) (defining "facility" as the "areal extent of contamination in the United States associated with the Upper Columbia River, and all suitable areas in proximity to the contamination for implementation of a response action"). In fact, Chief Judge Eagan concluded that "the definition of 'facility' is expansive enough to include the [Eucha-Spavinaw] Watershed within its scope." *See City of Tulsa*, 258 F.Supp.2d at 1279-80 (holding, however, that factual record before Court was insufficiently developed to determine whether that watershed constituted a facility). Nothing precludes a watershed from being a "facility" -- regardless of whether every acre is contaminated with a hazardous substance.

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[17] The definition of facility includes not just the term "site," but also the term "area." *See* 42 U.S.C. § 9601(9)(B) ("any site or *area*"). The plain meaning of "area" is "a geographic region." *See* Merriam Webster's Collegiate Dictionary (10th ed.).

Treating a watershed as a facility can advance CERCLA's goals. *See Cytec Indus., Inc. v. B.F. Goodrich Co.*, 232 F. Supp. 2d 821, 835-36 (S.D. Ohio 2002) ([T]he broadest geographical definition of facility that is appropriate under the specific facts and circumstances of a given case would likely best advance CERCLA's two underlying purposes -- to ensure prompt and efficient cleanup of hazardous waste sites and to place the costs of those cleanups on the potentially responsible persons.) Defendants' arguments should be seen for what they are: a futile effort to escape CERCLA liability. *See Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 419 (4th Cir. 1999) ("[W]here, as here, the only arguments in favor of designating multiple facilities are weak in themselves and merely represent thinly-veiled attempts by a party to avoid responsibility for contamination, designation of the property as a single facility is appropriate.")

The State has sufficient evidence to demonstrate a genuine issue of material fact precluding summary judgment against it on whether the IRW is a "facility." *See, e.g.*, ## 19-21, *supra.*[18] In short, Defendants' assertion that the State has "developed no evidence to demonstrate where hazardous substances have 'been deposited, stored, disposed of, or placed, or otherwise come to be located' in the IRW, or to support [its] necessary contention that contamination has spread through the entire alleged facility," MSJ at 21, is false. These hazardous substances have come to be located throughout the watershed. Thus, the IRW is a "facility."

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[18] To wit: there are about 1850 poultry houses throughout the IRW generating approximately 345,000 tons of poultry waste annually; the poultry waste is primarily disposed of on land in close proximity to the poultry houses; the IRW pasture soils are saturated with phosphorus; this phosphorus either runs off or infiltrates the soils to waters of the IRW; waters throughout the IRW are impaired by phosphorus at high concentrations; the IRW is a single interconnected hydrologic unit; and phosphorus introduced to the IRW streams is transported downstream to Lake Tenkiller. *See* ## 19-21, *supra.*

Defendants argue that non-contiguous facilities -- i.e., the grower buildings, structures, installations and equipment in the IRW, as well as the land where poultry waste has been applied -- cannot be aggregated as a single facility.[19] To support this flawed argument, Defendants point to 42 U.S.C. § 9604(d)(4), which provides that "[w]here two or more noncontiguous facilities are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the President may, in his discretion, treat these related facilities as one for purposes of this section." However, the mere fact that CERCLA allows the federal government to aggregate geographically dispersed facilities into a single facility does not preclude other entities from doing likewise under appropriate circumstances (e.g., where in the same watershed the same industry produces and releases the same hazardous substances in the same fashion threatening the same land and waters, etc.).[20] Indeed, to do so would be contrary not only to the requirement that CERCLA be interpreted broadly to achieve its purposes, but also to the logic underlying decisions like *Axel Johnson, Inc.*, 191 F.3d at 419 and *Cytec Indus.*, 232 F.Supp.2d at 835-36, which support single facility designation.

WHEREFORE, premises considered, "Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint" [DKT #1872] ("Motion") should be denied in its entirety.

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[19] Defendants also assert that the State has not identified the locations of the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied being a facility. As shown throughout this Response (*see, e.g.*, ## 19-21, *supra*), however, the State has shown the locations of the active poultry houses and offered substantial evidence as to the locations of where poultry waste from these houses has been land applied. Thus, these locations also constitute a "facility."

[20] Defendants' assertion that allowing entities other than the EPA to aggregate "would render meaningless the President's specific authority to do so" is without merit. The fact that others may aggregate would in no way affect the EPA's ability or authority to aggregate.

Respectfully submitted,

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